Evans Brothers Barber & Beauty Salons, Inc. *and* **Barbers, Beauticians and Allied Industries International Association, AFL-CIO-CLC.** Cases 10-CA-14974 and 10-RC-11885

May 22, 1981

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On July 31, 1980, Administrative Law Judge Elbert D. Gadsden issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed cross-exceptions and a brief in support thereof and in opposition to the exceptions.[1]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified herein.[2]

1. We agree with the Administrative Law Judge's conclusion that Respondent unlawfully created the impression of surveillance of its employees' protected concerted activities when its president, Evans, told employee Mitchell that he knew the employees had talked to the Union. We find, however, that the Administrative Law Judge erroneously omitted discussion and disposition of an additional allegation that Respondent unlawfully created the impression of surveillance.

In this regard, according to the uncontradicted testimony of employee Brewer, about 2 weeks before the October 24 election, Shop Manager Bobby Green asked Brewer if he had attended the union meeting that had taken place on the preceding night. Brewer then asked Green why he wanted to know. Green replied that he had seen Brewer at the meeting. As alleged by the General Counsel and the Charging Party, we find that Green's statement creates the impression of surveillance of union activities, and is therefore violative of Section 8(a)(1) of the Act.

2. The Charging Party asserts that the Administrative Law Judge should have recommended that the October 24 election be set aside and a second election directed. We agree.

Many of the unfair labor practices found herein occurred prior to the critical period commencing on October 4, 1979, when the petition was filed. As such, they may not be considered as a basis for setting the election aside except as they lend meaning and dimension to postpetition conduct or assist in evaluating it.[3] Nevertheless, three of the unfair labor practices were committed within the critical period. Thus, Shop Manager Green's unlawful threat of more onerous working conditions,[4] Green's questioning of employee Brewer about Brewer's attendance at a union meeting, found unlawful above, and Green's questioning of employee Norton about a union meeting,[5] all occurred within the critical period. And, in light of related prepetition conduct clearly indicating that these postpeti-

[1] Respondent additionally filed a motion to strike the Union's exceptions as untimely filed. In this regard, Respondent contends that it did not receive the Union's exceptions until August 27, 1980, 2 days after they were due in Washington, D.C. Assuming that copies of the exceptions were mailed by the Union at the same time as the exceptions themselves, Respondent argues that since its copy of the exceptions was postmarked on August 25, 1980, in Indianapolis, Indiana, the Union could not have harbored a reasonable expectation that its exceptions would arrive in Washington, D.C., by the August 25 filing date. Accordingly, Respondent contends that since the time of filing of the Union's exceptions exceeded the time allotted for such filing in Sec. 102.46 of the Board's Rules and Regulations, those exceptions should be struck as untimely filed.

In reply to Respondent's motion, the Union's attorney asserts that his secretary deposited the exceptions in the United States mail on Friday, August 22, 1980. An affidavit by the attorney's secretary to this effect is attached to the Union's reply. Additionally, the Union contends that receipt by the Board of the exceptions on August 27 constitutes substantial compliance with the required time limits. Finally, the Union argues that Respondent has failed to show that it was prejudiced by the late delivery of the exceptions.

We are unable to resolve, on the record before us, the factual conflict as to the date that the Union's exceptions were actually placed in the mail. Assuming, however, that Respondent's speculation is correct, we are mindful of the admonition in the Board Rules and Regulations, Sec. 102.121, that the Rules and Regulations should be liberally construed in order to effectuate the purposes and provisions of the Act. In this regard, we note that Respondent had adequate time in which to answer the Union's exceptions, and Respondent does not raise nor do we perceive any prejudice suffered by it due to the late filing. Accordingly, in the particular circumstances presented here and in the exercise of our discretion, we accept the Union's exceptions.

[2] Although in the section of his Decision entitled "The Remedy" the Administrative Law Judge recommended that Respondent be ordered to cease and desist from in any like or related manner interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Sec. 7 of the Act, he failed to include such a provision in his recommended Order. We shall modify the recommended Order accordingly.

[3] See, e.g., *Dresser Industries, Inc.*, 231 NLRB 591, fn. 1 (1977).

[4] His statements in the section of his Decision entitled "Respondent's 8(a)(1) Conduct" to the contrary, the Administrative Law Judge correctly found in sec. III,C, of his Decision that this threat by Green occurred about 2 weeks subsequent to the August 29 union meeting, well within the critical period.

[5] Employee Norton's uncontradicted testimony was that 3 days to a week after Norton's conversation with President Evans on August 31, 1979, Shop Manager Green asked Norton if he was going to a union meeting. A brief discussion ensued during which Norton did not tell Green whether or not he was going to the meeting. Norton did go to the union meeting and the next morning when he arrived to work Green said, *inter alia*, "Hey, I thought you were going to that meeting, I saw you there . . . . Yeah, we went by there and looked in, and I saw all of you in there." As found by the Administrative Law Judge, these remarks by Green to Norton unlawfully gave the impression of surveillance of union activities by Respondent. Moreover, according to Norton's testimony, the earliest date on which the remarks by Green to Norton on the morning after the union meeting could have occurred was October 4, the day the petition was filed. And, the Board has construed the critical period to include events occurring *on* or *after* the day of the filing of the petition. See, e.g., *Jerome J. Jacomet, d/b/a Red's Novelty Co. and R-N Amusement Corporation*, 222 NLRB 899 (1976), and *Kenworth Trucks of Philadelphia, Inc.*, 229 NLRB 815, 822 (1977). Accordingly, this unfair labor practice can be considered in setting the election aside.

tion unfair labor practices were not isolated incidents, we conclude that the first election should be set aside and a second election directed.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Evans Brothers Barber & Beauty Salons, Inc., Fort McClellan, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(f):

"(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election held on October 24, 1979, in Case 10-RC-11885 be, and it hereby is, set aside and that a new election be conducted.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT coercively interrogate employees about their and/or other employees' union membership, activities, and desires.

WE WILL NOT create the impression among employees that their concerted and/or union activities are under surveillance by Respondent, or that their efforts to organize and join a union are futile.

WE WILL NOT solicit employee grievances while the employees are engaged in an organizing campaign for the Union.

WE WILL NOT solicit employees concerning said grievances for the purpose of causing them to reject the Union as their collective-bargaining representatives.

WE WILL NOT threaten employees with more onerous working or personnel rules if they select the Union, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise and enjoyment of rights guaranteed them by Section 7 of the National Labor Relations Act, except to the extent that such rights may be affected by such lawful agreement in accord with Section 8(a)(3) of the Act. The bargaining unit is:

All haircutting employees, shoe shine people, manicurists, receptionist at its Fort McClellan, Alabama, facility, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

EVANS BROTHERS BARBER & BEAUTY SALONS, INC.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge: Upon unfair labor practice charges filed on September 4, 1979, by Barbers, Beauticians and Allied Industries International Association, AFL-CIO-CLC, herein called the Union or Charging Party, against Evans Brothers, herein called Respondent, a complaint and an amended complaint were issued by the Regional Director for Region 10, on behalf of the General Counsel on October 4, 1979, and November 30, 1979, respectively.

In substance the amended complaint alleges that on August 31, 1979, Respondent interrogated its employees concerning their union membership, activities, and desires; that on September 3, 1979, Respondent threatened its employees with more onerous working conditions if they selected the Union as their representative; that on August 31, 1979, Respondent, with knowledge of the employees organizing campaign, solicited employees' grievances; and that all of said conduct by Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended. On or about August 31, Respondent suspended an employee and thereafter, on September 13, 1979, discharged said employee and failed and refused to reinstate him because of his activities on behalf of the Union, in violation of Section 8(a)(3) of the Act.

Respondent filed an answer and an amended answer of December 4, 1979, and March 19, 1980, respectively, denying that it has engaged in any unfair labor practices as alleged in the amended complaint.

The hearing in the above matter was held before me in Anniston, Alabama, on April 9, 1980. Counsel for the General Counsel elected to make a summary argument on the record, in lieu of submitting a brief herein. A brief has been received from counsel for Respondent, and both counsel for the General Counsel's argument and

Respondent's brief herein have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and has been at all times material herein, an Alabama corporation with an office and place of business located at Fort McClellan, Alabama, where it is engaged in the barber business.

In the course and conduct of its business operations during the past calendar year, which period is representative of all times material herein, Respondent derived gross revenues in excess of $500,000 from its Fort McClellan, Alabama, operation, and during the same period purchased and received at its Fort McClellan, Alabama, facilities, goods valued in excess of $2,000 directly from suppliers located outside the State of Alabama.

The complaint alleges, Respondent admits, and I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Through the undisputed testimony of Hiram Walker, International representative for Barbers, Beauticians and Allied Industries International Association, AFL-CIO-CLC (BBAIIA), the General Counsel established that employees become members and participants in BBAIIA, herein called the Union, as an organization. The BBAIIA represents employees pursuant to negotiated contracts affecting hours, wages, and general working conditions of employees. It also exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of work, and working conditions. Mr. Walker also testified that he has been involved in negotiating such contracts with various employers, some of whom he identified on the record.

Based upon the foregoing uncontroverted evidence, I conclude and find that Barbers, Beauticians and Allied Industries International Association, AFL-CIO-CLC (BBAIIA), herein called the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

A. *Background Facts*

Respondent, Evans Brothers, owns and operates approximately 35 barbershops, including 5 such shops at Fort McClellan, Alabama. It has standard Army and Air Force Exchange contracts with the United States Government, which Respondent negotiates with the Army and Air Force. Such contracts are awarded on a bid basis. Respondent also has approximately 12 employees in the 5 shops located at Fort McClellan.

At all times material herein, the following named individuals occupying the positions set opposite their respective names, are, and have been at all times material herein, agents of Respondent, acting on its behalf in and about the vicinity of Fort McClellan Main Post Exchange, and are supervisors within the meaning of Section 2(11) of the Act: Tom Evans—Owner; Bobby Green—Shop Manager.

Tom Evans is president of Respondent and he visits the Fort McClellan shops approximately three times a year. Bobby Green is an assistant manager over the Fort McClellan shops.

Objections to the election and challenged ballots

A petition for an election was filed in Case 10-RC-11885 on September 4, 1979. An election by secret ballot was held on October 24, 1979, among the employees in the stipulated appropriate unit.[1] A tally of the balloting revealed that out of 12 eligible votes and 13 ballots cast, 4 cast valid votes for and 5 cast valid votes against Petitioner Union, and there were no invalid ballots. Four ballots were challenged and that number was sufficient to affect the results of the election on November 1, 1979.

On December 6, 1979, the Acting Regional Director for Region 10 issued and served on the parties his report on the objections and challenged ballots, in which he recommended to the Board as follows:

> (1) That the challenges to 3 ballots be overruled;
> (2) That the ballots be opened and counted and that the revised tally of ballots be issued; and that:

If the revised tally of ballots shows that the unresolved challenged ballot is no longer determinative of the results of the election and a majority of the ballots has been cast for the Petitioner, he recommends that a certification be issued for Respondent. However, if the remaining unresolved challenged ballot remains determinative, he recommends that the Board direct a hearing to resolve the issues raised by the challenged ballot and the Petitioner's objections, and that the case be consolidated with Case 10-CA-14974 for a hearing before an administrative law judge.

The Board issued its Order on January 22, 1980, directing the Acting Regional Director for Region 10 to open and count the challenged ballots, and to take certain action consistent with such Order. It adopted the Acting Regional Director's recommendation and, accordingly, ruled that the challenged ballots of Sara Green, Dwight Hulsey, and Phillip Principato are overruled, and directed the Acting Regional Director to open and count said ballots and to issue and serve on the parties a revised tally of the ballots.

If the revised tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, the Petitioner's objections will be moot and an appropriate certification for representation shall issue. However, if the revised tally of ballots shows that the remaining unresolved challenged ballot of Jimmy Dabbs is *determinative* of the results of the election, a hearing before an administrative law judge shall be held as recommended to re-

[1] The stipulated appropriate unit constituted:

> All haircutting employees, shoe shine people, manicurists, receptionist at its Fort McClellan, Alabama, facility but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

solve the issue concerning the employment status of Jimmy Dabbs.

On January 31, 1980, the Region, in making an effort to comply with the Board's Order, inadvertently opened and counted the ballots of four voters who had cast challenged ballots. In doing so, contrary to the Board's Order, it opened and counted the ballot of employee Jimmy Dabbs. However, since Dabbs' ballot was not determinative of the results of the election, no prejudice resulted to any party.[2]

The revised tally of ballots revealed that of approximately 12 eligible voters, 6 cast votes for, and 7 cast votes against the Petitioner. No objections to the revised tally were filed and on February 12, 1980, the Region inadvertently certified the results of the election. On March 4, 1980, pursuant to Section 102.69(b) of the Boards Rules and Regulations, Series 8, as amended, the Regional Director for Region 10 issued Orders reversing the certification of the results of the election issued on February 12, 1980, and consolidating Case 10-RC-11885 with Case 10-CA-14974 for a hearing before an administrative law judge.

B. *Employees Use of Alcoholic Beverage*

According to the undisputed testimony of barber-employees Dwight Hulsey, Luther Brewer, and Linda Mitchell, barbers in the respective barbershops at Fort McClellan drank beer in the shops almost daily after working hours; and at one time, some barbers used to drink beer during working hours, but Manager Green stopped that practice in June. Since then, just about all barbers, including Jimmy Dabbs and Manager Bobby Green, participated only in social drinking of beer in the shops after work. Barbers Hulsey and Mitchell testified that they last saw Manager Bobby Green drinking beer after work in the shop around August 21, 1979.[3]

Barber *Ralph Caver* testified that in May 1979, while working in the same shop with barber Jimmy Dabbs, he observed Dabbs drinking in the shop during working hours. He called the office of Manager Green and reported the incident to him. In this regard, *Manager Bobby Green* testified that on or about April 1979 he received a telephone call from barbers George Teague and Ralph Caver, informing him that Jimmy Dabbs was in the shop drunk and requesting his removal from the shop. Manager Green further testified that he bodily removed Dabbs from the shop and reported the incident to President Tom Evans. Mr. Evans told him to counsel with Dabbs and let Dabbs know that he (Green) was not going to tolerate drinking or drunkenness in the barbershop, and that he would have to let him (Dabbs) go if the problem continued. Green said he warned Dabbs pursuant Evans' instructions. President Evans supports Green's testimony in this regard, except he stated the incident occurred in June.[4]

Employee *Linda Mitchell* further testified that she had never seen Jimmy Dabbs drinking in the shop during working hours, that she saw him drunk on only one occasion and that was at a social function at the home of Manager Bobby Green. However, just about all of the barber witnesses testified that barbers in general did not drink during working hours.

C. *The Organizing Activities of Respondents' Barber Employees and Respondent's Knowledge Thereof*

Barber *Linda Mitchell* testified that she worked for Respondent in the Main Exchange Barbershop at Fort McClellan under the supervision of Manager Bobby Green for 2-1/2 years. In late August 1979, Hiram Walker, a representative of the Union (BBAIIA), came to the Main Exchange Barbershop and asked Mitchell, Hulsey, Mr. Brewer, and Andy Burns if they would be interested in a Union. They said yes, and they decided to meet at Dabbs' shop on August 29, 1979, since that shop remained open later (7 p.m.) than the other shops. She arrived at Dabbs' shop, Shop 1891, at 7 p.m. Present were Union Representative Hiram Walker and other barbers. Mitchell's testimony is corroborated in this regard by fellow-employee Dwight Hulsey, who testified that the meeting on August 29 informally started at the PX, then moved to the Pizza Bar across the street in front of Shop 1891, thereafter to the outside of Shop 1891, and finally they went inside Shop 1891 at approximately 7:30 p.m.

The duration of the meeting in the shop lasted for 45 minutes and all of the barbers, except Walker, had refreshments including cold beer. Continuing to testify, Linda Mitchell said after she arrived at Shop 1891 at 7 p.m., she decided to go over to the Pizza Bar where she purchased a beer and returned with the beer to 1891 about 7:30 p.m. There were no customers in the shop at the time she arrived and when she returned to the shop at 7:30 p.m., no one was drinking beer except her. However, before the meeting adjourned everybody, except Walker and the people in the Pizza Bar across the street, had a beer. During the meeting Mitchell said they discussed the Union and signed union cards.

Respondent *President Tom Evans* acknowledged, on examination by counsel for the General Counsel, that during the months before the election *he had heard that employees were discussing whether or not to unionize.* He also *acknowledged that he knew that the employees had a union meeting on August 29, 1979,* in Shop 1891 where Dabbs worked. He said Manager Green told him about the meeting that night but he did not tell him it was a union meeting until the next morning. He said Green also told him that Dabbs was drinking beer. President Evans further acknowledged that he was concerned about the employees meeting in the shop on the night of August 29; that he was concerned about what problems

[2] The facts set forth above are undisputed and are not in conflict in the record.

[3] The above testimony being consistent amongst the three witnesses, it is undisputed, not in conflict, and is therefore credited.

[4] Although barber Caver said he telephoned Manager Green in May 1979, Manager Green testified that he received Caver's call in April 1979 and President Evans testified to this as a single incident having occurred in June, I do not find this discrepancy significant in determining the credibility of the three witnesses. Since all three witnesses (Caver, Green, and Evans) were testifying from memory and estimating the period of time to which they had reference, it is reasonable and probable that their time frames overlapped by several weeks, which could very well account for the month difference of April, May, and June. Since their testimony in all other respects is mutually corroborative and undisputed in the record, it is hereby credited without reservations.

they had; and that Manager Green told him the employee meeting was about unionization. Consequently, Evans said he wanted to talk to the employees about their grievances, and he decided and did in fact talk with them on Friday, August 31, 1979.

On August 31, 1979, President Evans met with each employee individually in the Post PX. Present with him at the time of the individual meetings was Mona Gatch, Services Vending Supervisor, who took notes during the meetings. In this regard barber *Linda Mitchell* testified that her conversation with Mr. Evans was as follows:

> Q. All right. What do you recall being said?
>
> A. Mr. Evans asked me if I was dissatisfied with the manager, or if I was dissatisfied with my work, or working conditions; and I told him no. He asked me what the problems were; why was I unhappy. And I told him it was because of the tip credit. And he told me that the tip credit was his benefit; that he had bid it in the contract, and he had to have it. *He asked me if I had attended a meeting over at the barbershop on the 29th,* and I told him yes. *He asked me who invited me,* and I told him, "No one. We got together and went on our own." He asked me if there was drinking there, and I told him, yes, there was drinking, but it was outside the shop.
>
> *Mr. Evans told me he knew that we had talked to the union, and that he didn't object to us having a union, but that a union couldn't help us; that it couldn't increase my percentage or get the tip credit removed.*
>
> Q. All right. Is there anything else you recall from that conversation.
>
> A. *He also said that he would accept my resignation if I was not content with the percentage I was getting; that he had six men standing by to go to work.*

Mitchell further testified that this was the first time Evans had asked her whether she had any complaints about management. During the meeting she told Evans she had some problem with the percentage out of each barber's tips, out of their gross pay. President Evans admitted that he had asked all employees if they had attended the union meeting on August 29, and whether they had any complaints against management.

Barber *Luther Brewer* testified that his conversation with Evans on August 31 was as follows:

> A. Conversation started with *Evans asking me if I wanted to continue on working.* I asked him what he meant; and then the conversation continued on by telling me that *he didn't think the union could do us any good at that time, because he couldn't afford a raise at that time.*

Brewer said Evans also asked him had he seen any drinking going on in the shop and he said not during working hours. Brewer said their conversation continued as follows:

> A. . . . He said that he didn't oppose us joining the union; we could join the union if we wanted to; but if we didn't want to work, that he had six other barbers that he could replace us with.

Barber *Curtis Norton* testified that President Evans asked him did he have any gripes about management and he told him he did not like the percentage rate taken from the barber's tips and the fact that they had to clean the shop after working hours on their own time. He admitted that President Evans told him he did not care if he (Norton) joined the Union.

President Evans testified that he asked most of the employees had they ever seen drinking during working hours and just about all of the barbers said they did not. *Evans said he asked Jimmy Dabbs if he authorized the union meeting on August 29 and what was discussed there.* After the meeting, Evans said while talking with Dabbs he suspended him (August 31, 1979). He admitted he had never disciplined Dabbs or any other employee for drinking on the job; and that this was the first time he had ever disciplined (fined or suspended) any employee at Fort McClellan. President Evans' testimony with respect to his meeting with the employees individually was essentially corroborated by Vending Service Supervisor Mona Gatch.

Manager Bobby Green testified that he received a call at home around 9 p.m. on August 29, advising that the barbers were in the shop having a meeting and drinking. He called the shop and asked Dabbs why was the shop open that late since it normally closed at 7 p.m. Green said he also asked who was present and Dabbs said he was alone, but he could hear talking in the background. He told Dabbs he could hear others talking and he asked who was there. Dabbs then named the barbers who were present. He ordered Dabbs to get everybody out of the shop, to lock the shop and go home.

On the next day, August 30, 1979, Manager Green said he stopped at Dabbs' Shop 1891 around 12:10 p.m. Several barbers were there who should have been at other shops. As he entered the shop, Dabbs was sitting in his chair with a beer can in his hand. Customers were in the shop since it was opened for business. Green said he asked Dabbs, Brewer, Brooks, and another person who was there, was that their beer. All of them said no and the unidentified person did not answer. When Dabbs tried to hide the beer can behind his chair, he (Green) picked it up. Thereupon, Green said he told Dabbs he could not work with beer in the shop and told him to take the day off. He immediately reported the incident to President Evans and advised him that he was still having problems with Dabbs, that Dabbs was still drinking, and that he needed assistance to remedy the problem.

President Evans testified that on *August 31* he went to Shop 1891 and talked to Dabbs. At that time Dabbs told him he saw nothing wrong with customers drinking in the shop or himself having a beer after working hours. He informed Dabbs he was suspended for 2 weeks pending investigation of the problem. During his investigation Vending Service Supervisor Mona Gatch informed him that she had seen Dabbs on at least two occasions when he appeared to have been under the influence, and Gatch so testified in this proceeding. She further testified that she also informed Evans of complaints from customers

about Dabbs' drinking which written complaints were not substantiated or admitted into evidence. Subsequent to the investigation, *President Evans* testified that he informed Dabbs he could no longer use him because he had a drinking problem; and that he was sorry and wished that he would get some help. During the extended conversation that he had had with Mr. and Mrs. Dabbs, President Evans said Mrs. Dabbs told him that Dabbs had a drinking problem. President Evans said he discharged Dabbs because he learned Dabbs had a drinking problem in May or June when he was escorted from the shop staggering as a result of intoxication.

Barber Jimmy Dabbs did not testify in this proceeding.

1. Other interrogation by Respondent

Linda Mitchell testified that about 2 weeks subsequent to the August 29 meeting, Manager Green told her if the employees got a union they would have to go by union rules; that they would have to stay in the shop; and that they would have to sign in and sign out to leave.

Curtis Norton testified that 3 days to a week subsequent to his conversation with President Evans on August 31, Manager Bobby Green asked him was he going to that meeting up on the hill, and he asked, "What meeting?" Green said, "That man's here," and he asked again, "Are you going up there" and Norton said, "Bobby, I'm not interested." Green then said, "Well you better go on up there. . . . Everybody else is going." Although he did not tell Green whether or not he was going, Norton said he nevertheless went to the meeting that night. The next morning when he reported for work, Norton said Manager Green said, "Hey, I thought you weren't going to that meeting, I saw you there. . . . you were there." He (Norton) said sure enough, and Green said, "Yeah, we went by there and looked in, and I saw all of you in there." Norton said he asked Green why didn't he come in and make himself known and drink a cup of coffee or something. Green said, "Oh, I don't want to see you fellows." Shortly thereafter Green asked him, "Why did you go up there", and Norton said he went up there to get his money.

Barber *Dwight Hulsey* testified that during his individual meeting with President Evans the latter asked him if he (Hulsey) had authorized the union meeting in Building 1891, and he replied, "No." Evans also asked him if he had any complaints about Manager Bobby Green. Hulsey said he replaced Jimmy Dabbs after the latter was discharged and he stated he had never observed Dabbs drinking during working hours.

2. Analysis and conclusions

The issues raised by the evidence and presented for determination herein are as follows:

1. Did Respondent have knowledge of the concerted and/or union activities of its employees (including Jimmy Dabbs) before it laid off Dabbs on August 31, 1979, and discharged him on September 13, 1979?

2. Was Respondent's discharge of Dabbs discriminatorily motivated by Dabbs' concerted and/or union activities, or did Respondent discharge Dabbs for cause, namely, drinking an alcoholic beverage (beer) while on duty?

3. Did Respondent on or about August 31, 1977, coercively interrogate its employees concerning their concerted or union activities and desires?

4. Did Respondent on or about August 31, 1979, or thereafter, give its employees the impression their concerted and/or union activities were under surveillance?

5. Did Respondent on or about August 31, or thereafter, solicit its employees concerning grievances they had with Respondent?

6. Did Respondent on or about August 31, or thereafter, solicit its employees concerning said grievances for the purpose of causing its employees to reject the Union as their collective-bargaining representative?

3. Concerted or union activities

The credited evidence of record is unequivocally clear that Respondent by its own acknowledgment had heard about the employee's plan to organize the Union prior to August 29, 1979; and also, that the employees held an organizing meeting in Barbershop 1891 on August 29, 1979. More precisely, President Evans had learned that there was an employees' meeting in the shop on the evening of August 29, and on the morning of August 30, he said he learned from his manager, Bobby Green, that the meeting was an effort to organize a union.

I therefore conclude and find upon the foregoing evidence that Respondent (President Evans) had knowledge of its employees' concerted and/or union activities on and before August 29, 1979.

4. Barber employees beer drinking past time

Equally well established by the credited evidence of record is the fact that nearly all of Respondent's barber-employees had a practice of drinking beer in their respective barbershops after the close of business. The record further shows that a few barber-employees (including Jimmy Dabbs) drank beer during working hours until approximately June 1979, when Manager Bobby Green terminated the practice. Upon reports from fellow-barber employees between the last week in April and the first week in June 1979, Manager Bobby Green went to the shop of dischargee Jimmy Dabbs and found him in an intoxicated state. Manager Green escorted Dabbs out of the shop, directed him to take the remainder of the day off, and warned him that Respondent was not going to tolerate such drinking, and that if he continued to do so Respondent would terminate his employment.

During the barber's organizing meeting at Shop 1891 on August 29, Respondent (Manager Green and President Evans) learned that employees including barber Jimmy Dabbs were drinking beer in the shop during and after their meeting held between 7:30 and 9 p.m. Manager Green called the shop and ordered Dabbs to get everybody out, lock the shop, and go home. On the next day, August 30 (about 12:10 p.m.), Manager Green stopped by Shop 1891 and found barber Jimmy Dabbs sitting in his chair with a beer can in his hand while customers were in the shop. Dabbs tried to hide the beer

can behind his chair and when Manager Green asked whose beer was it, Dabbs and other barbers denied it was theirs. Green then picked up the can and told Dabbs he could not work with beer in the shop and ordered him to take the day off.

On the next day, August 31, President Evans went to Shop 1891 and asked Dabbs did he authorize the union meeting on August 29. He thereupon discussed the beer drinking incident with Dabbs. When *Dabbs replied that he did not see anything wrong with himself or the customers drinking a little beer in the shop,* President Evans decided upon that response to suspend Dabbs pending further investigation of his beer drinking habit. Having received reports from Post Services Vending Supervisor Mona Gatch that she had seen Dabbs under the influence of alcohol during working hours on two occasions, President Evans concluded that Dabbs had a drinking problem and terminated his employment on September 13, 1979.

As to whether Respondent suspended Dabbs on August 30 and finally discharged him on September 13, for drinking beer on duty and because it believed he had a drinking problem, it is first observed that the August 13 beer-drinking episode was the second occasion on which Respondent had evidence that Dabbs had been consuming alcohol while on duty. On the first occasion in or about May 1979, Dabbs was escorted from the barbershop in an intoxicated condition. He was sent home for the day and *clearly warned* that, if he continued to consume alcohol in the shop during business hours, Respondent would discharge him.

Although Dabbs permitted himself and fellow workers to hold a meeting with a union representative in his shop at the close of business on the evening of August 29, he nevertheless took a chance of having a beer can in his hand (presumably drinking from it in the presence of customers) during business hours on the next day, August 30. Since Dabbs had the beer can in his hand, it may be reasonably inferred that he was drinking from it, even though Dabbs denied that it was his beer. This inference is especially reasonable, when it is particularly noted that Dabbs, to my knowledge, did not appear, and as the record shows, did not testify in this proceeding. Moreover no explanation was offered by counsel for the General Counsel or by the Charging Party for Dabbs' nonappearance.

The record does not show that Dabbs assumed any more of an active role in the employees' organizing effort than any other barber-employee, except that he permitted the employee meeting to be held in the shop of which he was in charge, because Shop 1891 had the latest closing hour. Since Dabbs was present and permitted the employee meeting to be held in Shop 1891, it is understandable speculation by the Charging Party that Respondent might have suspended, and thereafter terminated Dabbs because of the employee meeting held at the shop on the previous night. However, such speculation is immediately obliterated when the evidence of the conduct of Dabbs and other barber-employees prior to the August 29 meeting is viewed with the evidence of his conduct on August 30. No other barber-employee was caught with evidence of alcoholic consumption while on duty on a prior occasion, or on the day subsequent to the August 29 meeting. The record is barren of any evidence of union animus by Respondent prior to its suspension of Dabbs on August 30, pending further investigation of his conduct on duty.

Respondent's investigation of Dabbs' drinking habit revealed undisputed and credited testimony that Dabbs had been seen under the influence of alcohol on two occasions while on duty. Moreover, Respondent (President Evans) said, in evaluating Dabbs' record in terms of evidence of his drinking, that it had considered the foreseeable legal liability for which Respondent could be held accountable, for entrusting barber duties (including the use of razors) to a barber-employee known to drink alcoholic beverages while on duty. This is so even though Dabbs drank beer on duty in violation of company policy, and in derogation of an ultimate warning issued to him personally by Respondent not to do so. To find that Respondent discharged Dabbs for engaging in concerted and/or union activities under the above circumstances would be tantamount to a finding that an employee engaged in such activities could violate significant employee rules and be immune from disciplinary action by the employer pursuant to Section 7 of the Act. Certainly the Congress intended no such result and neither has the Board so held.

Consequently, I conclude and find upon the foregoing uncontroverted evidence that after the termination of a practice of drinking beer in the shops during business hours, and after having been personally warned to refrain from drinking while on duty by Respondent, Jimmy Dabbs nevertheless continued to do so on August 30; that Dabbs was suspended by Respondent on the same day (August 30) and finally terminated on September 13, after it was established that he had also been under the influence of alcohol on duty on two prior occasions; that Respondent thereupon concluded upon Dabbs' record and the latter evidence that he had a problem with alcohol, and terminated his employment for *cause* on September 13, 1979. Therefore, neither Respondent's suspension nor its discharge of Dabbs was motivated by Dabbs' concerted and/or union activity.

5. Respondent's 8(a)(1) conduct

Based upon the foregoing undisputed and credited evidence, I conclude and find that on August 31, 1979, Respondent engaged in the following conduct:

1. Interrogated barber-employee Linda Mitchell by asking her did she attend, and who invited her to attend the meeting of employees two nights prior thereto to discuss unionization of Respondent, and by asking barber Curtis Norton was he going to the meeting (referring to employees meeting with the union representative). Such interrogation of Mitchell and Norton by Respondent had an inherently coercive effect upon their organizing rights protected by Section 7 of the Act, because it was conducted by a high-ranking official of Respondent, without any assurances that they would not be subjected to acts of reprisal by Respondent. Although President Evans told Mitchell he did not object to the employees organizing a Union, such expression was not the explicit kind of

assurance required by Respondent to strip his interrogation of its restraining and coercive character.

2. President Evans gave Linda Mitchell the impression that the employees' concerted and/or union activities (attending the employer's meeting on August 29) were under surveillance by Respondent by telling her he knew the employees had talked to the Union. President Evans also told Mitchell the Union could not help the employees to improve their economic interest, thus conveying the impression that the employees' unionization of Respondent would be futile. By creating or trying to create the impression of such surveillance and hopelessness of employees, by such a high ranking official of the Employer, as the president, can and did have a restraining and coercive effect upon the exercise of employees' Section 7 rights, and resulted in violation of Section 8(a)(1) of the Act.

3. After asking barber Luther Brewer did he want to remain in Respondent's employ, President Evans immediately told Brewer a Union could not do the employees any good *because he (Respondent) could not afford it*, without furnishing Brewer any financial data to support such a gloomy economic forecast of Respondent. Such statements by Respondent therefore had the tendency to lead employees to believe organizing a union was futile. As such, it had a restraining and coercive effect upon their rights in violation of Section 8(a)(1) of the Act.

4. President Evans solicited employee grievances during the employees organizing campaign by asking barbers Curtis Norton and Dwight Hulsey if they had any gripes about management. In doing this, Respondent restrained and coerced its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

5. On or about September 3, Manager Bobby Green threatened employees with more onerous working conditions by telling them if they selected the Union as their collective-bargaining representative, they would have to work by union rules, that is, stay in the shop, and sign in and out when leaving.

All of the above outlined restraining and coercive conduct by Respondent was carried out by Respondent in an effort to get the employees to reject the Union as their collective-bargaining representative. Although Respondent told the above-named employees he did not care about or object to them organizing a union, such statements did not constitute a satisfactory assurance against employer reprisal against the employees for engaging in concerted and/or union activities. In other words, Respondent's statements did not clearly promise the employees that no adverse actions would be taken against them by Respondent for their efforts to organize the Union.

6. The question of a bargaining order

Since Respondent did not discriminatorily discharge Jimmy Dabbs in violation of Section 8(a)(3) of the Act, the unfair labor practices committed by Respondent prior to the union election were the 8(a)(1) violations hereinbefore discussed. However, considering the above-described 8(a)(1) violations, it is noted that there is an absence of any evidence that Respondent threatened its employees with shutdown of its business operations, discharged any of its employees, or threatened to discharge them. The record does not show that Respondent promised or offered any employees benefits or awards for refusing to engage in or support activities on behalf of the Union. Instead, the evidence established that Respondent committed several incidents of coercion in the form of interrogation, efforts to create the impression of surveillance of employee organizing activities, and solicitation of employee grievances while the employees were in the process of organizing.

While I find under the aforedescribed circumstances that Respondent committed some 8(a)(1) violations, I do not find that such unlawful conduct constituted independent, substantial, and pervasive unfair labor practices disruptive of election processes, preventing the holding of a free election and dissipating the Union's majority, thereby warranting the issuance of a collective-bargaining order.

Therefore, paragraphs 12 and 13 of the complaint, alleging that Respondent discriminatorily suspended and discharged employee Jimmy Dabbs in violation of Section 8(a)(3) of the Act, should be, and hereby are, dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. They are unfair labor practices within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 protected rights, in violation of Section 8(a)(1) of the Act by coercive interrogation of its employees about their union interest and activities, creating the impression that the organizing activities of its employees were under surveillance by Respondent, giving employees the impression that efforts to organize the Union would be futile, and soliciting employee grievances for the purpose of causing them to reject the Union as their collective-bargaining representative, the recommended Order will provide that Respondent cease and desist from engaging in such unlawful conduct.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from in any like or related manner interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by

Section 7 of the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

CONCLUSIONS OF LAW

1. Evans Brothers, the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Barbers, Beauticians and Allied Industries International Association, AFL-CIO-CLC, is and has been at all times material herein, a labor organization within the meaning of the Act.

3. By coercively interrogating its employees on August 31, 1979, about their and other employees union interest or activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

4. By giving the employees the impression that their activities for or on behalf of the Union was under surveillance by Respondent and was futile, Respondent violated Section 8(a)(1) of the Act.

5. By soliciting employees grievances concerning their union interest and/or activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

6. By soliciting employees concerning their grievances for the purpose of causing them to reject the Union as their collective-bargaining representative, Respondent violated Section 8(a)(1) of the Act.

7. By threatening employees with more onerous work rules if they select the Union as their collective-bargaining representative, Respondent violated Section 8(a)(1) of the Act.

8. The above unfair labor practices were not so independent, substantial, and pervasive that they were disruptive of the election process, thereby precluding a fair election and warranting an Order to bargain.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Evans Brothers Barber & Beauty Salons, Inc., Fort McClellan, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees about or concerning their union activities or desires.

(b) Creating the impression among employees that Respondent has their concerted or union activities under surveillance and that it would be futile for them to join the Union.

(c) Soliciting employee grievances about management during the employees' organizing activities.

(d) Soliciting employee grievances against management for the purpose of causing employees to reject the Union as their collective-bargaining representative.

(e) Threatening employees with more onerous work rules if they select the Union as their collective-bargaining representative.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at Respondent's place of business, in Fort McClellan, Alabama, copies of the attached notice marked "Appendix."[6] Copies of said notice on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order if enforced by a Judgment of the United Stated Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."